In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PRESS PUBLISHING COMPANY.
No. 541.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error sued out by the United States to review a judgment of the Circuit Court for the Southern District of New York quashing an indictment for libel and is prosecuted under the Act of March 2, 1907 (34 Stat., 1246), which provides—

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to any

indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

* * * *

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

* * * *

The Press Publishing Company, defendant in error, was indicted March 4, 1909, in the Southern District of New York for libel committed by publishing in its newspaper called The World certain articles defaming and maligning William Howard Taft, Theodore Roosevelt, Douglas Robinson, Charles P. Taft, and William Nelson Cromwell, by charging them with gross corruption in connection with the purchase by the United States of the Panama Canal. The libelous articles appeared in The World of October 3, 4, 7, 14, 16, and 19, 1908. (Rec., 81.) The indictment is in fourteen counts and charges that the defendant in error, at West Point and in the post-office building at New York, in manner and form and at the time aforesaid, and in a place which had been ceded to and was, and is, under the jurisdiction of the United States, unlawfully did commit the offense of falsely, wickedly, knowingly, maliciously, and scandalously composing, writing, printing, and publishing a criminal libel upon the said William Howard Taft, Theodore Roosevelt, Douglas Robinson, Charles P. Taft, and William Nelson Cromwell, to their great damage, scandal, infamy, and disgrace,

to the evil example of all others in like case offending, and against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided (R., 4).

In effect the published articles charge that Charles P. Taft, Douglas Robinson, and William Nelson Cromwell, with J. Pierpont Morgan and others, acting through an American syndicate, obtained control of the securities of the French company which owned the Panama Canal route and its properties for the approximate sum of $3,000,000. Aided by the intimacy which they enjoyed with Theodore Roosevelt, then President of the United States and brother-in-law of Douglas Robinson, and William H. Taft, then Secretary of War and brother of Charles P. Taft, and by the cooperation of these officials with them, they were enabled to effect the sale of the Panama Canal to the United States for $40,000,000 and reap a profit of some $36,000,000, which was divided, as charged, "among government favorites in the world of politics and finance." (Rec., 5, 25.) The articles elaborated this charge into further charges, that the records of the French company had been turned over secretly to the Roosevelt administration and had been destroyed, and that it was impossible to ascertain officially details of the transaction. (Rec., 40, 41.) It was charged that the French company had vanished, that "Washington knew the canal grafters," and that the revolution in Panama was manufactured to the end of consummating the corrupt transaction. (Rec., 41, 42.)

The defendant pleaded not guilty March 15, 1909 (Rec., 81), and on January 25, 1910, the cause went to trial on this plea. A jury was impaneled and sworn and thereafter the following proceedings were had:—

It was admitted by the defendant in error that it was a corporation which, during October, 1908, had its printing establishment in the Pulitzer Building, Park Row, Borough of Manhattan, city of New York; that this was a place within the jurisdiction of the State of New York and not a place within the exclusive jurisdiction of the United States; that it printed its newspaper known as The World at that time in the said Pulitzer Building and at no other place; that during October, 1908, and for many years prior thereto and to July 7, 1898, the military reservation at West Point, in Orange County, N. Y., in the Southern District of New York, was and had been a tract of land purchased and accepted by the Congress of the United States by the consent of the legislature of said State of New York, and used by the United States as a fort and military post and reservation under the name of West Point, and over which exclusive jurisdiction was ceded to the United States long before said period by the State of New York and subsequent to the said purchase, and that ever since such cession exclusive jurisdiction has been exercised by the United States.

It was admitted further that during the month of October, 1908, and for many years prior thereto and to July 7, 1898, the United States exercised exclusive

jurisdiction over a certain tract of land in the Borough of Manhattan, city of New York, and in the Southern District of New York, bounded by Broadway, Park place, and Mail street, upon which stood the post-office building, and which said tract of land had been purchased and accepted by the Congress of the United States by the consent of the legislature of the State of New York, and on which the said United States has maintained a needful building, used by it as a court-house and post-office. (Rec., 86.)

It was admitted further that on each and every day during the month of October, 1908, the defendant in error delivered upon the post exchange mentioned in the indictment, upon the aforesaid military reservation at West Point, twenty-nine copies of the defendant's newspaper, known as The World. The post exchange was carried on defendant's regular circulation list as a subscriber. During the same period of time the defendant in error also delivered to one Walter S. Mayer, a post-office inspector in charge, at his place of business in the aforesaid court-house and post-office building, a daily copy of its newspaper, known as The World. Such daily copy was delivered to the said Mayer gratuitously and at his request.

It was admitted further by the defendant that all of the papers delivered as aforesaid, at West Point and the post-office building in New York City, contained the articles set out in the different counts of the indictment. (Rec., 87.)

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The Government admitted that all of the issues of the newspaper called The World containing the articles aforesaid were printed at the printing establishment of the defendant in error in Park Row, city of New York, and were circulated therefrom throughout the United States and all of the States, and were circulated and published upon the Federal territory at West Point and in the post-office and court-house building in New York City in the regular course of the defendant's business.

The Government then introduced some evidence which, the defendant admitted, tended to prove the colloquium of each of the counts of the indictment. (Rec., 88.)

Thereupon, on January 26, 1910, counsel for the defendant in error, addressing the court, said (Rec., 88):

"If your honor please, as it now appears from the record that the newspapers containing the articles complained of were printed by the defendant in its printing office on Park Row in the city of New York, and there published; and that they were circulated to the federal territory of the United States described in the indictment, to wit, West Point and the post-office building in this city, in the ordinary course of daily circulation, I now move that your honor quash this indictment or dismiss this proceeding, or, as your honor may be advised, instruct the jury to acquit the defendant, upon the following grounds:

"First. The court has no jurisdiction in this case because there is no statute of the United States authorizing the prosecution.

"Second. The act of 1898 does not apply to the case as disclosed by the evidence.

"Third. If construed so as to cover the acts shown by the evidence, the act is unconstitutional.

"Fourth. The offense, if any, was committed wholly within the jurisdiction of the State of New York and was punishable there.

"Fifth. The defendant, being a corporation, is incapable of committing the offense charged in the indictment."

Mr. Nicoll then argued for the defendant, concluding as follows:

"Now, for all these reasons, and reserving such other time that your honor will allow me after the district attorney closes his argument, I move that this indictment be quashed." (Rec., 88 89.)

After hearing argument the court delivered an opinion, set out in the record at pages 89 and 93, in which among other things it said:

> The court is relieved of much embarrassment by the form of one of the motions made. The jurisdiction of the court is peremptorily challenged by the motion to quash. Other motions have been made which will not be considered. But inasmuch as a decision under a motion to quash is now speedily reviewable by the highest court, I shall dispose of the case under that motion. (Rec., 89.)
>
> * * * * *
>
> It is therefore ordered that a judgment of this court be entered quashing the indictment herein, because upon the construction of the

> statute, hereinbefore stated, the indictment is not authorized by the statute upon which it rests. (Rec., 93.) (Act of July 7, 1898, 30 Stat., chap. 576, p. 717, assimilative statute.)

Thereupon the United States attorney said: "Before that is done, I ask that a juror be withdrawn in order that no question of a jeopardy may enter into the case."

> "The COURT. Motion granted. A juror was then withdrawn." (Rec., 93.)

On the 25th day of February, 1910, the following final judgment was entered:

> An indictment against the Press Publishing Company, the defendant above named, having been found and filed by the grand jurors of the United States in and for the Southern District of New York, in the office of the clerk of the United States Circuit Court for the Southern District of New York on the 4th day of March, 1909, and thereafter the defendant above named having been arraigned and having thereupon interposed a plea of not guilty, and the issues raised by said plea having been thereafter brought on for trial, and a jury thereupon having been drawn, empaneled, and sworn, and the Government having presented certain evidence in support of the allegations contained in the indictment, and thereupon on the 26th day of January, 1910, the defendant having made a motion herein to quash the indictment herein; and after hearing argument thereon now on motion of De Lancey Nicoll, esq., counsel for the defendant, it is

> Ordered and adjudged that the said motion to quash be, and the same hereby is, granted, and the indictment is hereby quashed, set aside, and declared to be null and void because the indictment is not authorized under any construction of the act of Congress upon which it is alleged to be predicated, to wit, the act of Congress of July 7, 1898, chapter 576, section 1, 30 Stat. at Large, at page 717, or under the construction of any other statute of the United States now in force. (Rec., 82–3.)

A bill of exceptions was duly settled and the United States sued out this writ of error. (Rec., 85–93.)

The substantial question here is whether the United States courts have jurisdiction under the act of July 7, 1898 (Chap. 576, 30 Stat., 717), to punish a corporation which printed in the city of New York a newspaper containing a libel criminal under the laws of the State of New York and circulated copies of the same within the Federal territory of West Point.

ARGUMENT.

I.

THE CAUSE IS NOT NOW A MOOT ONE AND MAY BE CONSIDERED UNDER THIS WRIT OF ERROR.

The indictment being sufficient, the defendant was in jeopardy after the jury was sworn and evidence introduced and when the motion to quash was made by its counsel. The jury was discharged before rendering a verdict. But the cases clearly estab-

lish "that courts of justice are invested with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States." (*Thompson* v. *United States*, 155 U. S., 271, 274.) It is also quite clear that under certain circumstances a defendant who procures a judgment against him upon an indictment to be set aside, or expressly or impliedly consents to the discharge of a jury after jeopardy has attached, may be tried anew upon the same indictment or upon another for the same offense. (*United States* v. *Ball*, 163 U. S., 662, 672; *United States* v. *Jones*, 31 Fed., 725; *Coleman* v. *Tennessee*, 97 U. S., 509, 521; *Joy* v. *State*, 14 Ind., 139; Cooley's Constitutional Limitations, 7th ed., 468–470.)

The motion to quash was manifestly irregular at the time it was presented. But the Government submits that considering the whole record the defendant by the action of its counsel procured and consented to the discharge of the jury, and that it may be put on trial again. Consequently, the case is not now a moot one. We are informed that the counsel for the defendant in error, both in the court below and here, accept the view that such was the result of their action.

II.

HISTORY AND INTERPRETATION OF THE ASSIMILATIVE STATUTE.

This case does not involve the question whether the United States courts have common-law jurisdiction of libel. We assume that the authority of the circuit court to entertain this prosecution rests upon statutory basis. It is the common jurisdiction granted by a series of congressional statutes in all cases where an act is committed upon Federal territory which if committed in the State where the territory lies would be punishable there.

The act of July 7, 1898 (chapter 576, 30 Stat., 717), the assimilative statute, was one of a number enacted by Congress for the purpose of enabling the United States to punish offenses committed upon Federal territory, but not covered by the general provisions of Federal law. It operates to transfer the state law to Federal territory for the purpose of punishing acts committed there which, if performed outside and in the jurisdiction of the State, would be amenable to its laws.

The first Federal crimes act was passed April 30, 1790; it mentioned and defined only the major crimes, such as treason, murder, perjury, bribery, piracy, and the like. When it was put into operation, its insufficiency to protect the United States in the numerous cases of crimes not specifically named was exposed and became a matter of general knowledge.

To supply this need Congress passed the first assimilative statute of March 3, 1825 (4 Stat., 115), written by Judge Story, and entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." Sections 1 and 2 provide for the punishment of arson committed within any fort, navy-yard, dockyard, arsenal, armory, or magazine over which the United States has jurisdiction, or on the site of any light-house or other needful building belonging to the United States. Section 3 reads as follows:

> *And be it further enacted*, That if any offense shall be committed in any of the places aforesaid, the punishment for which offense is not especially provided for by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which said fort, dockyard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such State.

This statute was construed shortly after its passage in *United States* v. *Paul* (6 Peters, 141), wherein this court held that "the laws of the State" were only those in force March 3, 1825.

Congress passed another assimilative statute April 5, 1866 (c. 24, 14 Stat., 13). Section 1 prohibited forging bonds, etc. Section 2 reads as follows:

> *And be it further enacted*, That if any offense shall be committed in any place which has

> been, or shall hereafter be, ceded to and under the jurisdiction of the United States, which offfense is not prohibited or the punishment thereof is not especially provided for by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the State in which such place is, or may be situated, now in force, provide for the like offense when committed within the jurisdiction of such state; and no subsequent repeal of any such state law shall affect any prosecution for such offense in any of the courts of the United States.

In the Revised Statutes of 1877 the assimilative statute was brought down to date and incorporated as section 5391, which is as follows:

> If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not especially provided for by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such state law shall affect any prosecution for such offense in any court of the United States.

In 1898 Congress enacted the fourth assimilative statute, the one now under consideration. Section 2 reads as follows:

> That when any offense is committed in any place, jurisdiction over which has been retained by the United States, or ceded to it by a State, or which has been purchased with the consent of the State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall upon conviction in the Circuit or District Court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which said place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purposes; and no subsequent repeal of any such state law shall affect any such prosecution. (30 Stat., 717.)

The last assimilative statute (not involved herein) was passed March 4, 1909 (c. 321, 35 Stat., 1145), effective January 1, 1910. See U. S. Compiled Stats., Sup. 1909, p. 1477.

In view of *United States* v. *Paul, supra,* the indicated intention of Congress has been to keep the National Government abreast of the times by enabling it to use the recent statutes of the States,

and thereby adjust its criminal code to existing conditions.

These statutes have been considered in many cases. They are cited at length in a note appended to *Franklin* v. *United States* (216 U. S., 559), wherein the act of 1898 is declared to be unobjectionable.

It has been held that a post-office is "a place" within the meaning of the act of 1898 (*United States* v. *Andem*, 158 Fed., 996); that the assimilative statute applied to the crime of stabbing with intent to kill committed upon a lock on a navigable stream (*United States* v. *Tucker*, 122 Fed., 518); and that the act applies to criminal conduct or a contempt committed in the chambers of a federal judge, which are within the definition of "a place." (*Sharon* v. *Hill*, 24 Fed., 726–731.)

III.

CRIMINAL LIBEL UNDER THE NEW YORK STATUTES AND AT COMMON LAW.

The following provisions of the New York Penal Code of 1881 were in force in 1898.

> SEC. 242. *Libel defined.*—A malicious publication, by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes, or tends to cause, any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel.

SEC. 243. *Libel a misdemeanor.*—A person who publishes a libel, is guilty of a misdemeanor.

SEC. 244. *Malice presumed; defense to prosecution.*—A publication having the tendency or effect mentioned in section thirteen hundred and forty is to be deemed malicious, if no justification or excuse therefor is shown.

The publication is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends.

The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public.

SEC. 245. *Publication defined.*—To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself.

SEC. 246. *Liability of editors and others.*—Every editor or proprietor of a book, newspaper, or serial, and every manager of a partnership or incorporated association, by which a book, newspaper, or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper, or serial. But in every prosecution for libel the defendant may show in his defense that the matter

complained of was published without his knowledge or fault and against his wishes by another who had no authority from him to make the publication and whose act was disavowed by him so soon as known.

SEC. 249. *Indictment for libel published against resident.*—An indictment for a libel, contained in a newspaper published within this State, against a resident thereof, may be found either in the county where the paper was published, or in the county where the person libeled resided when the offense was committed. In the latter case the defendant is entitled to an order of the Supreme Court, directing the indictment against him to be tried in the county in which the paper was printed and published, upon compliance with the following conditions:

1. He must apply for the order within thirty days after being committed upon, or giving bail to answer, the indictment;

2. He must execute a bond to the complainant, with two sufficient sureties, approved by the judge hearing his application, in a penal sum fixed by the judge, not less than two hundred and fifty nor more than one thousand dollars, conditioned for the payment, in case the defendant is convicted, of all the complainant's reasonable expenses in going to and from his place of residence and the place of trial, and in attendance upon the trial;

3. He must, within ten days after the granting of the order, file the order and deposit the bond with the clerk of the county in which the indictment is pending.

> SEC. 250. *Indictment for libel published against nonresident.*—An indictment for a libel published against a person not a resident of this State must be found and tried in the county where the paper containing the libel purports upon its face to be published; or, if no county is indicated upon the face of the paper, in any county where the paper was circulated.
>
> SEC. 251. *Restriction on indictment for libel.*—A person can not be indicted or tried for the publication of the same libel, against the same person, in more than one county.

Except as modified by the foregoing statutory provisions, the general rule of the common law as to the place where one may be prosecuted for libel prevails in New York.

It is settled that the crime of libel does not consist in the mere composition of the article or the physical production of the paper, but in exposing or publishing the defamatory matter to the community. Roscoe Crim. Ev., Vol. II, 890, 897; Wharton Crim. Law (8th ed.), 1618 *et seq.;* Bishop Crim. Law (6th ed.), Vol. II, 905, 927, 949; Townsend Slander and Libel (3d ed.), 144.

One who writes a libel in one county with intent to publish and who afterwards publishes it in another may be indicted in both. (Am. and Eng. Enc., vol. 18, 1119 and cases cited.)

In *Com.* v. *Blanding* (3 Pick., 304) the defendant, in Providence, R. I., delivered the libelous article to a newspaper printed in that city which

had some circulation across the Massachusetts line in Bristol County. He was indicted in Massachusetts. It was contended that there was no evidence that the writing was composed or published in Bristol County. Speaking for the court, Parker, C. J., said:

> We think the admitted facts, that it was at the request of the defendant inserted in a public newspaper printed in Providence, which, though in another State, borders on the county of Bristol, and that that paper usually circulates in the town of Rehoboth, in that county, and that the number containing the libel was actually received and did circulate in that town, were competent and conclusive evidence of a publication in the county of Bristol. In this respect the case is like that of *Rex* v. *Burdett* (4 B. and A., 95).

The *Blanding* case was approved by this court in the *Palliser* case (136 U. S., 257, 266), where it is said:

> When an offense is committed by means of a communication through the post-office, the sender has sometimes * * * been held to be punishable at the place where he mails the letter * * * but it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed: and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, whether the unlawfulness of the communication through the post-office consists in its being a threatening letter

(*Rex* v. *Girdwood*, 1 Leach, 142; S. C. 2 East P. C. 1120; *Esser's case*, 2 East P. C. 1125) or a libel (*Rex* v. *Johnson*, 7 East, 65; S. C., 3 J. P. Smith, 94; *Rex* v. *Burdett*, 4 B. and Ald., 95, 136, 150, 170, 184; *Com.* v. *Blanding*, 3 Pick., 304; *In re Buell*, 3 Dill., 116, 122).

In the case of *In re Cook* (49 Fed., 833) the court, considering the question of the defendant's liability to criminal prosecution in a jurisdiction from which he was absent at the time when the crime was committed, said:

> His actual presence at the time is unessential. In contemplation of law, he is present by his agent deputed to perform the wrongful act he has planned. * * * His will contributed to the wrongdoing, and he is responsible for the act done by his agent by his authority, the same as though performed by himself alone. It is because his will set the force in motion that was operative to crime. Thus, Mr. Bishop observes, one may commit an offense within a State upon whose soil he has never set his foot, as in putting forth a libel. (*Com.* v. *Blanding*, 3 Pick., 304.)

In the recent case of *Armour Packing Company* v. *United States* (153 Fed., 1–5), the Circuit Court of Appeals for the Eighth Circuit used this language:

> The general principle that one who commits a criminal act in one county, State, or district may be held liable for its continuous operation in another to which its effect extends, is established by these and many other authorities, such as those involving the maintenance of a nuisance in one county which affects

> property in another * * * and those involving the publication of a libel in a newspaper in one jurisdiction which circulates in another (*Com.* v. *Blanding*, 3 Pick., 304; 15 Am. Dec., 214), and yet in all these cases the offense may be complete in the jurisdiction in which it is first committed, and still be indictable and punishable in those in which its continuing operation and effect extend.

The same doctrine has found later enunciation in the Supreme Judicial Court for Massachusetts in *Com.* v. *Macloon* (101 Mass., 1) and *Com.* v. *Pettes* (114 Mass., 307–311).

In 1873 it was sought to remove the publisher of the New York Sun from the Southern District of New York to the District of Columbia for trial upon an information for libel committed by the circulation of a copy of his paper there. The paper was printed in New York City and a copy of it circulated in Washington. Judge Blatchford, then on the District bench, refused the warrant of removal because under the laws of the District of Columbia the prosecution was based upon information only and not upon indictment, and the trial proposed was therefore opposed to the provisions of the Fifth Amendment. Afterwards Judge Blatchford, as a member of this court, participated in the decision of the *Palliser* case, *supra*, wherein the court referred to the removal proceeding (*In re Dana*, 7 Ben., 1) before him, and said:

> A warrant to remove to the District of Columbia a person alleged to have printed a

> libel in a newspaper published in New York, and circulated by his authority in the District of Columbia, was refused by Mr. Justice Blatchford, then District Judge, not because the offense could not be punished in the District of Columbia, but because the law of that District provided for its prosecution by information only, and was therefore unconstitutional. (*In re Palliser*, 136 U. S., 257, 367.)

The same doctrine was also upheld by Judge Dillon in the case of *In re Buell* (3 Dill, 116), where the court said that the proprietor of a paper published in Detroit might be indicted in Washington for a libel contained in such paper if circulated in the District of Columbia.

In the case of *Haskell* v. *Bailey* (25 U. S. App., 99) it was held that a civil action for libel lay in Virginia in favor of a person reflected upon in an article in a paper published in Tennessee and circulated in Virginia, where such article was libelous under the laws of Virginia and not libelous under the laws of Tennessee, since publication was the gravamen of the offense.

In the case of *State* v. *Kountz* (12 Mo. App., 511) the proprietor of a newspaper printed in Pennsylvania was indicted in Missouri for the offense of libel committed by the circulation of one copy of that paper in Missouri. The court held the offense complete and that one copy was as good as a thousand.

And this general doctrine is affirmed in *Burton* v. *United States* (202 U. S., 344, 388).

IV.

THE ACT OF JULY 7, 1898, APPLIES TO A LIBEL CIRCULATED IN WEST POINT OR THE POST-OFFICE BUILDING, ALTHOUGH PRINTED OUTSIDE.

The same act or series of acts may constitute an offense equally against the United States and the State subjecting the guilty party to punishment under the laws of each government. (*Cross* v. *N. C.*, 132 U. S., 131–139.)

West Point and the post-office building are places over which the United States has exclusive jurisdiction within the terms of section 2 of the act of 1898.

The Constitution gives Congress plenary legislative power over such places. Offenses committed therein are against the national sovereignty. That Congress has power to provide for all crimes against the United States is incontestable. This may be done by original statutes or by adopting the existing legislation of States. The latter method was adopted in the act of 1898.

Circulating defamatory written or printed statements within the limits of West Point or the post-office building constitutes an offense against the United States—not the State. And Congress has declared that this offense shall be punished in the Federal courts according to the provisions of the law of New York. Otherwise it could not be punished at all.

The defendant insists that it was not the purpose of Congress to include libel within the provisions of the act of 1898 where the article was printed outside, and only circulated within, the Federal jurisdic-

tion, and attempts to support this contention by references to the history of the act, and especially by dwelling on the inconveniences which might result. The general language of the statute being broad enough to support the Government's position, the burden is upon defendant to establish that the present case is an exception.

The court below cited no direct authority and there is none to support its position. At different times Congress has passed assimilative acts without attempting to except libel from their general terms. The last was approved on March 4, 1909. On the other hand, it has distinctly recognized that all crimes were intended to be included therein. Thus section 2145, R. S., extends the laws of the United States to the Indian country, but section 2146 expressly restricts the operation of the assimilative act and specifies the crimes for which Indians shall be punished. (See *United States* v. *King*, 81 Fed., 625.)

It is not only the right but the duty of Congress to so legislate concerning territory under its exclusive jurisdiction as to preserve peace and good order therein. A libel is criminal because of its ill-effect upon the community where circulated, and there is no reason why those within exclusive Federal jurisdictions should be subjected with impunity to the peculiar evils arising therefrom. Because one may be punished for issuing a libel in New York is no reason for allowing him to go free of all punishment for circulating it at West Point. The people in the latter place are entitled to protection.

It is highly important that legislation concerning criminal matters should take into consideration the peculiar conditions of the particular community. If Congress should undertake to do this for all places under the exclusive jurisdiction of the United States and pass a complete code for each, the difficulties would be enormous. A much better result has been accomplished by adopting the state law applicable in the vicinity.

Doubtless much can be said concerning the inconvenience which will result to those who traffic in defamatory articles if subjected to prosecutions in sundry places where their libels are circulated. But the inconvenience which may be suffered by criminals has not generally been regarded as adequate reason for permitting them to operate without restraint.

No substantial reason can be advanced in favor of exempting from prosecution in the Federal courts a publisher who prints his newspaper in New York City and circulates it in West Point, which would not apply if he circulated it in the District of Columbia.

The suggestion that the offense charged may be punished in New York and therefore was not intended to be included in the act of 1898 is without merit, for the obvious reason that the State of New York can not punish an offense committed at West Point against the United States. Such offense must

be punished as here attempted, or be "dispunishable." (See *United States* v. *Davis*, 5 Mason, 356. Opinion by Story, J.)

We submit that the court below erred and that the judgment entered there should be reversed.

GEORGE W. WICKERSHAM,
Attorney-General.
JAMES C. MCREYNOLDS,
STUART MCNAMARA,
Special Assistants to the Attorney-General.

OCTOBER, 1910.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 541.

THE UNITED STATES, *Plaintiff in Error*,

vs.

PRESS PUBLISHING COMPANY.

Brief for the Defendant in Error.

DE LANCEY NICOLL,
JOHN D. LINDSAY,
RAYMOND D. THURBER,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 541.

THE UNITED STATES, Plaintiff in Error,

vs.

PRESS PUBLISHING COMPANY.

BRIEF FOR THE DEFENDANT IN ERROR.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York, sued out by the United States under the Criminal Appeals Act of 1907 (34 Stat. 1246), to review a judgment quashing an indictment, such judgment being based upon the construction of the statute (Act of July 7, 1898; 30 Stat. 717) upon which the indictment rests.

The Indictment.

The indictment contains fourteen counts, and is predicated upon the circulation in federal territory of six alleged libellous articles which appeared in the defendant's newspaper, *The World*, in its issues of October 3, 4, 7, 14, 16 and 19, 1908.

All of the counts except the fourth and eleventh charge that the defendant, "contriving and . . . intending to injure" Theodore Roosevelt, then President of the United States, Douglas Robinson, his brother in law, William Howard Taft, Secretary of War at the time in question, Charles P. Taft, his

brother, and William Nelson Cromwell, an attorney at law practicing in the City of New York, to excite them to breaches of the peace, "and otherwise to *stir up disorder among the people*," composed, wrote, printed and published the alleged libels at and within the "fort and military reservation of West Point," in the Southern District of New York (Record, pp. 4, 11, 24, 30, 34, 39, 46), such *publication* being accomplished by delivering "for perusal by persons residing at the said military post and reservation" twenty-nine copies of each of the issues at a store in West Point known as the Post Exchange (pp. 8, 21, 27, 31, 36, 42–3, 50). The remaining seven counts charge that the defendant composed, wrote, printed and published the alleged libels at and within the United States post office building, in the Borough of Manhattan of the city of New York, in the same district (pp. 54, 58, 62, 66, 70, 74, 79), and that their *publication* was accomplished by delivering one copy of each issue "to one Walter S. Mayer, post office inspector in charge, at his office in room 106 of the said post office building" (pp. 55, 59, 63–4, 66–7, 70–71, 75, 79).

The fourth and eleventh counts charge that the article of October 7th was published in like manner, but that it constituted a libel on Robinson, Charles P. Taft and Cromwell only; and this accounts for the fact that there are seven, instead of six, counts in each series.

The articles relate to certain alleged conduct of the individuals above named, and are averred to have been published not only of and concerning these persons, but also of and concerning the "matter of the acquisition and purchase . . . by *the Government of the United States*, for the sum of $40,000,000 from the . . . *Compagnie Nouvelle du Canal de Panama* of its . . . property and proprietary rights at the Isthmus of Panama, preliminary to the construction by the Government of the United States of the Panama Canal across that Isthmus" (pp. 4, 12, 25, 30, 34, 40, 46, 54, 58, 62, 66, 70, 75, 79).

The Statute.

The indictment is founded on the Act of July 7, 1898, entitled, " An Act to Protect the Harbor Defenses and Fortifications Constructed or Used by the United States from Malicious Injury, and for Other Purposes " (30 Stat., 717). It reads as follows:

> " That when any offence is committed in any place, jurisdiction over which has been retained by the United States, or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dock-yard, or other needful building or structure, the punishment for which offence is not provided for by any law of the United States, the person committing such offence, *shall*, upon conviction in a circuit or district court of the United States for the district in which the offence was committed, *be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offence*, when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution."

This statute was modeled upon the Act of March 3, 1825 (4 Stat., 115), which was the first Federal enactment of this character. The Act of 1825 was entitled, " An Act More Effectually to Provide for the Punishment of Certain Crimes Against the United States, and for Other Purposes." Sections I and II provided for the punishment of arson

> " when committed within any fort, dock-yard, navy-yard, arsenal, armory or magazine, the site whereof is ceded to and under the jurisdiction of the United States, or on the site of any lighthouse or other needful building belonging to the United States, the site whereof is ceded to them and under their jurisdiction as aforesaid."

Section III was as follows:

> "*And be it further enacted* That if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognizance thereof, be liable to and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place ceded as aforesaid is situated, provide for the like offence when committed within the body of any county of such state."

The remaining sections defined and prescribed the punishment of various other offences, but made no reference to the crime of libel.

The third section of the act was first considered by the courts in United States *v.* Paul (6 Peters, 141), in which it was held that the words "the laws of the state" meant only the laws in force at the time of the passage of the act, to wit, the 3rd of March, 1825.

In United States *v.* Barney (5 Blatchford, 294), the Circuit Court imposed a further limitation of this section by deciding that it applied only to places that had been ceded to the United States prior to its enactment. In view of this decision, Congress adopted an amendment, inserting before the word "ceded," the words "or may hereafter be." That was accomplished by the second section of the Act of April 5, 1866 (14 Stat., p. 13), providing:

> "That if any offence be committed in any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States, which offence is not prohibited, or the punishment thereof is not especially provided for, by any law of the United States, such offence shall . . . be liable to, and receive, the same punishment as the laws of the State in which such place is, or may be situated, now in force, provide for the like

> offence when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offence in any court of the United States."

This provision was re-enacted, without any substantial change, as Section 5391 of the Revised Statutes.

Later on, another infirmity was observed in the fact that it did not cover cases where federal reservations had not been acquired by purchase, but were simply carved out of the public domain and jurisdiction retained by the United States. This was sought to be cured by the Act of 1898, upon which the indictment in the case at bar was framed. This act also omits the surplus words of the former statute, "which offense is not prohibited."

The judgment of the Circuit Court.

At the trial a jury was impaneled and sworn (Record, p. 86). Certain facts were then stipulated, and the Government also gave certain proof (pp. 86-88).

It was admitted by both parties:

> "That the total circulation of THE WORLD on October 3rd, 1908, was 376,326 copies, of which number 316,456 copies were circulated in the city of New York, and not upon territory within the exclusive jurisdiction of the United States, the remaining 59,870 copies being spread throughout the United States; that on October 19, 1908, the total circulation of THE WORLD was 382,410 copies, of which number 323,198 copies were circulated in the city of New York, and not upon any territory within the exclusive jurisdiction of the United States, the remaining 59,212 copies being spread throughout the United States; and that the total circulation of THE WORLD on the other dates of publication mentioned in the indictment was about 380,000 copies, of which upwards of 320,000 were circulated

> in the city of New York, but not within Federal territory, the remainder being spread throughout the United States" (p. 88).

It having thus appeared that the articles set forth in the indictment were printed in the defendant's printing office in the City of New York, within the jurisdiction of the State of New York, and that they were circulated in Federal territory in "the regular course of, and as a part of the regular circulation of *The World*," the defendant's counsel moved to quash the indictment on the ground, among others, that the prosecution was unauthorized by any statute of the United States, the Act of 1898 not applying to the case as disclosed by the evidence (*Id.*).

The Court, in adopting this view, expressed the opinion that Congress, in enacting the measures under consideration, had never intended to do more than entrust to the Federal courts the punishment of offenses "either begun and ended, or primarily committed, on Federal territory" (p. 92), and directed the entry of a judgment quashing the indictment, "because, upon the construction of the statute, heretofore stated, the judgment is not authorized by the statute upon which it rests" (p. 93).

By the judgment accordingly entered, the indictment is

> "quashed, set aside and declared to be null and void, because the same is not authorized under any construction of the Act of Congress upon which it is alleged to be predicated, to wit, the Act of Congress of July 7, 1898 . . . or under the construction of any other statute of the United States now in force" (p. 83).

The sole question before this Court is the correctness of this ruling.

United States *v.* Keitel, 211 U. S., 370, 398.

United States *v.* Mescall, 215 U. S., 26, 31.

United States *v.* Stevenson, *Id.*, 190.

ARGUMENT.

FIRST.—Even though the language of the Act of July 7, 1898, were literally broad enough to cover the case at bar, it should not be so construed for the following reasons:

1. Because the general acquiescence of legal minds for nearly a century in the negative of the proposition forbids the construction now, for the first time, asserted by the Government;

2. Because a literal construction would lead to injustice, oppression and absurd consequences;

3. Because the construction contended for by the Government is not only unnecessary to remedy the definite evil aimed at by Congress, but would create another evil which it was the intention of Congress to avoid; and

4. Because the whole history and life of the country is utterly at variance with any such construction.

The Government contends that the burden is on the defendant to show that the case is not within the statute in view of what is termed its "plain language." But such is not the law. The elementary rule is that criminal statutes must be construed strictly in favor of the defendant. Before one can be punished criminally, his case must be plainly and unmistakably within the statute; and, if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.

United States *v.* Clayton, 2 Dill., 219.
United States *v.* Reese, 5 Dill., 405, 414.
United States *v.* Whittier, 5 Dill., 35.
United States *v.* Sheldon, 2 Wheat., 119.
United States *v.* Wiltberger., 5 Wheat., 76.
United States *v.* Garretson, 42 Fed. Rep., 22, 25.

Keeping this principle in mind, we proceed to discuss the foregoing propositions:

1. The general acquiescence of legal minds for nearly a century in the negative of the proposition now, for the first time, asserted by the Government, forbids the interpretation of the statute in accordance with that proposition.

The first and most impressive argument against the construction which the Government seeks to put upon the statute is the fact that, although it has been a part of the law of the United States for eighty-five years, no one has ever before been heard to claim that the courts of the United States had jurisdiction over newspaper libels simply because of their incidental circulation in these ceded places.

The prosecution is *sui generis*. It is without precedent. Books and records will be searched in vain for such an indictment as this. Although nearly a century has elapsed since the principle embodied in the statute was first adopted, during which period the United States has been served by attorney-generals and district-attorneys of distinguished learning and ability, and during which the great newspapers of this country have circulated through the places ceded to the United States Government by the different States, this is the first time in the history of the administration of American criminal law that the Government has put forth the claim here asserted.

During this period we have passed through the most momentous events of our history. Four wars have been fought, one of them a civil war, in which desperate passions were aroused and the very existence of the nation was at stake; we have lost three presidents by assassination; we have passed through twenty presidential elections; we have survived a number of financial panics; but notwithstanding these and other crises in our national existence and all the fierce discussions of the press which accompanied them, no one has ever claimed till now that

the courts of the United States have jurisdiction to punish a libel first printed, published, and circulated in one of the states, and which, in the course of a general circulation, has happened to penetrate into these federal reservations. This circumstance alone is the strongest possible argument against the prosecution. It has remained for the lawyers of our day and generation to spell out of this statute, although it has existed for nearly a century, authority for a proceeding of this sort.

Such a long period of inactivity indicates the settled judgment of lawmakers and lawgivers and law administrators that no such jurisdiction exists. As was said by Mr. Justice Johnson, in delivering the opinion of the Court in United States *v.* Hudson (7 Cranch, 32), denying the right of the Federal courts to exercise a common law jurisdiction in criminal cases:

> "Although this question is brought up now, for the first time, to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case, for many years, has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition."

2. A literal construction of the statute would lead to injustice, oppression and absurd consequences.

The rule is well established, that a case, even though clearly embraced within the literal meaning of the language employed, will be held not to come within the statute where the latter evidently had a different object, and a literal construction would lead to injustice, oppression or absurdity.

> United States *v.* Kirby, 7 Wall., 482, 486.

In the case cited, the Court was construing a statute which provided:

> "that, if *any person* shall knowingly and wilfully obstruct or retard the passage of the

> mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offense, pay a fine not exceeding one hundred dollars."

This Court held that the act did not embrace the case of a sheriff and his posse, arresting a mail carrier for crime, saying:

> "All laws should receive a sensible construction. General terms should be so limited in their application *as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.* The reason of the law in such cases should prevail over its letter" (7 Wall., pp. 486–7).

According to the theory of the Government in this case, the publication of a single libel constitutes a separate and independent crime in every place situated in the states, but under the exclusive jurisdiction of the United States, in which such libel circulates. Thus, the publication of a specified article in the West Point Reservation is charged as a crime in one count; and the publication of the same article in the Post Office Building in New York City is charged as a distinct and independent crime in another count. As there are fifteen or more places under Federal jurisdiction in the Southern District of New York, the publication of a single newspaper article might constitute fifteen distinct crimes in that district alone; and as there are certainly over two thousand of such places in the whole country, the publication of a single paper might constitute more than two thousand distinct crimes. All that would be necessary would be that it should circulate widely enough, and that (as is invariably the case) libel should be a crime in each State in which the place under Federal jurisdiction should be situated.

It would thus, upon the contention of the Government, be possible to crush an owner or editor,

under an intolerable burden of crime; and, if this be not injustice, oppression and absurdity, we can conceive of nothing that would answer the description. If to this be added the possibility of removal, according to the asserted right of the Department of Justice, the entire time and fortune of the unhappy publisher might be absorbed in the endeavor to vindicate himself.

Such a construction certainly will not be put upon the Act if it can be avoided, for it contravenes the fundamental principle of criminal jurisprudence that crime is not divisible, and that, when the impulse is single, but one indictment lies, no matter how long the action may continue.

Wharton, Crim. Law (10th ed.), Sec. 27.

> "This notion of rendering crime, like matter, infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced."
>
> State *v.* Commissioners, 2 Murphy (N. C.), 371.

> "If in civil cases the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions."
>
> State *v.* Cooper, 13 N. J. L., 361, 375.

The constitutional objection is also grave, for such a law does, in substance, "abridge the liberty of speech and of the press,"—that is, if to "abridge" such liberty means to so curtail it that no owner or editor of a paper could with safety freely discuss public affairs.*

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*The New York law fixes a penalty of one year's imprisonment, or a fine not exceeding five hundred dollars or both. In some of the States a more severe penalty may be imposed, in others a milder; but in quite a number the common law still prevails, so that since many of our great daily journals circulate in probably all of the two thousand or more federal corners, it is easy to imagine the severity of the penalty that might be legally applied in a federal prosecution maintainable under the construction of the statute for which the Government contends.

3. The construction contended for by the Government is not only unnecessary to remedy the definite evil aimed at by Congress, but would create an evil which it was the intention of Congress to avoid.

In United States *v.* Palmer (3 Wheat., 610, 630–2), the statute under construction provided for the punishment of piracy when committed "by any person or persons," or by "any captain or mariner of any ship or vessel." In holding that this applied only to American citizens, or to persons on board of American vessels, this Court, speaking through Chief Justice Marshall, said:

> "The Constitution having conferred on Congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and have committed no particular offense against the United States. The only question is, has the legislature enacted such a law? Do the words of the Act authorize the Courts of the Union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them? The words of the section are in terms of unlimited extent. The words, 'any person or persons,' are broad enough to comprehend every human being. *But general words must not only be limited to cases within the jurisdiction of the State, but also to those objects to which the legislature intended to apply them.* . . . But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. . . . Every nation provides for such offenses the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government."

In Holy Trinity Church *v.* United States (143 U. S., 457), it was held that an act forbidding the importation of aliens "under contract or agreement . . . to perform labor or service *of any kind* in the United States" did not include a contract between an alien and a religious corporation, whereby the former removed to the United States and entered into the service of the latter as its rector. It was said (p. 472):

> "The construction invoked cannot be accepted as correct. It is a case where there was presented a *definite evil*, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

A "guide to the meaning of a statute is found in the evil which it is designed to remedy, and for this the Court properly looks at contemporaneous events, *the situation as it existed, and as it was pressed upon the attention of the legislative body.*"
Id., p. 463.

So considered, it will be plainly apparent that the Act of 1825, upon which the statute of 1898 is modeled, had one general purpose, and only one—*to provide for the punishment of acts which could not be punished by the States, and which, if not prosecuted by the Federal Government, would go wholly unpunished.*

The first Federal Crimes Act was passed at the second session of the First Congress, and was approved by President Washington on April 30, 1790.

It was soon discovered to be defective. Many crimes escaped punishment because committed in places within the Union, but excepted from State jurisdiction, and because the Federal Act failed to provide for the offenses in question. Statutes were enacted from time to time to supply these deficiencies; and the view was also advanced that the Federal courts were authorized to exercise a common law jurisdiction in criminal cases. But this contention, as we have seen, was disposed of by this Court in United States *v.* Hudson, decided in 1812. Mr. Justice Story was a member of the court and participated in the decision. He was quick to perceive its results and the necessity for legislation by Congress to cover offenses in places where the State had parted with its jurisdiction. Accordingly in 1813 he prepared and sent Attorney-General Pinkney "some sketches of improvements in the criminal code of the United States."

> "It is grossly and barbarously defective," he wrote about this time. "The courts are crippled, offenders, conspirators and traitors are enabled to carry on their purposes almost without check."
>
> Life of Joseph Story, Boston, 1851, Vol. 1, p. 244.

"What think you," he queried in a letter shortly afterwards, "of a government where public crimes on the seas are, with very few exceptions, left wholly unpunished, and *crimes on the land are suffered to remain without the least criminal action?*" (*Id.*, p. 247).

Notwithstanding the necessity pointed out by Mr. Justice Story of Federal legislation to cure this crying evil, ten years elapsed before the matter was taken up by Congress. The delay is, however, easily accounted for by the fact that the country at that time was passing through a reaction from the

period of "ardent nationalism," which culminated in 1812; and leaders in Congress were too jealous of the new and unexpected powers which the National Government had been found to possess to pass a law conferring upon it even adequate jurisdiction in criminal cases.*

On February 10, 1823, James Buchanan, then a member of the Judiciary Committee of the House of Representatives (Webster being its Chairman), submitted a resolution that the committee be instructed "to inquire whether there be any, and if any, what crimes not now punishable by law, to which punishments ought to be affixed."

In offering this resolution, Buchanan referred to the decision in the Hudson case, and said:

> "Congress have annexed punishments but to a very few crimes, and those all of a very aggravated nature. The consequence is, that a great variety of actions, to which a high degree of moral guilt is attached, and which are punished as crimes at the common law, and by every State in the Union, may be committed *with impunity* on the high seas and in any place where Congress has exclusive jurisdiction. To afford an example; An assault and battery, with intent to commit murder, may be perpetrated, either on the high seas or in a fort, magazine or dockyard belonging to the United States, and there exists *no law to punish such an offense*. This is a palpable defect in our system which requires a remedy; and it is astonishing that none has ever yet been supplied."

He added that he did not expect that any bill could be matured and passed into a law at that session. If, however, the Judiciary Committee would take the subject into consideration, and report upon it to the House before it rose, it would

*See The American Nation, Hart, 1819-1829, "Reaction toward State Sovereignty," p. 299.

call public attention to it, and insure the passage of a bill at an early period of the next Congress. The resolution was then adopted.

Annals of Congress, 17 Cong., 2 Sess., 1822–1823, 929.

Mr. Justice Story had meanwhile drawn a bill dealing with the subject, the eleventh section of which became the basis of Section 3 of the Act of 1825. "This," he said, in a carefully prepared argument, in which the bill was taken up clause by clause, and its provisions and purposes explained,

> "is the most important section of the whole bill. The criminal code of the United States is singularly defective and inefficient. . . . Few, very few, of the practical crimes (if I may so say) are now punishable by statutes, and if the courts have no general common law jurisdiction (which is a vexed question), they are *wholly dispunishable*. The state courts have no jurisdiction of crimes committed on the high seas or in places ceded to the United States. *Rapes, arsons, batteries and a host of other crimes may in these places be now committed with impunity.* Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? *These are cases where the United States have an exclusive local jurisdiction.* And can it be less fit that the Government should have power to protect itself in all other places where it exercises a legitimate authority. That Congress has power to provide for all crimes against the United States is incontestible."
>
> Life of Joseph Story, Boston, 1851, Vol. I, p. 293.

> "The printed bill was originally prepared by myself and submitted to my brethren of the Supreme Court. It received a revision from several of them, particularly Judges Marshall and Washington, and was wholly approved by them, and indeed, except as to a single section, by all the other Judges. Judge Johnson expressed some doubt as to the elev-

> enth section; but, as I understood him, rather as to its expediency than the competency of Congress to enact it. I think that I am at liberty to say that it will be satisfactory to the Court if it is passed."
>
> *Id.*, p. 297.

With Mr. Justice Story's proposed measure before him Webster drew a bill, which the committee reported, and which, with modifications, passed both Houses at the next session of Congress. The debates on the bill show very clearly the intention not alone to deal exclusively with cases which would otherwise go entirely unpunished, but also to avoid a conflict of jurisdiction between the States and the Federal Government. The general purpose of the act was stated by Buchanan to be, the desire to correct a defective system of laws in which "no provision had ever been made for the punishment of the crimes which it embraced when committed in places within the *exclusive* jurisdiction of the United States" * (Register of Debates in Congress, Gales & Seaton, 1824-1825, Vol. I, pp. 157-8).

But a determined purpose to avoid any question of conflicting jurisdiction appears throughout the debates. The fourth section, as drafted and presented to Congress, provided for the punishment of certain crimes when committed

> "upon the sea, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States" (*Id.*, p. 152).

* It is to be noted that there has never been any danger of these particular ceded places becoming "havens of refuge" for offenders against the laws of the State, for the various legislative cessions have expressly reserved to the State the right to execute its civil and criminal process therein (Laws of New York, 1857, Ch. 762; 1875, Ch. 359; 1876, Ch. 410; 1888, Ch. 300), so that no publisher of a libel printed within the territorial jurisdiction of the State and afterwards disseminated in the New York post office building or at West Point could ever escape prosecution by hiding himself in either of those places.

Mr. Wickliffe, of Kentucky, moved to amend the section by inserting the provision, "and not within the jurisdiction of any State or Territorial Government" (*Id.*, p. 154).

> "He explained and supported the amendment, as intended to prevent collisions between the authority of the General and State Governments. . . . He conceived the State Governments to be entirely competent to inquire into and punish crimes committed within their own jurisdictions, and that, as there was no necessity, *there would be no advantage, in giving the United States concurrent power to do the same*" (*Id.*, p. 154).

Webster replied that:

> "He had already stated to the committee *that one of the principal objects in framing this bill had been to avoid a conflict of territorial jurisdictions between the United States and the several states.* . . . The class of crimes provided for in this section not only might happen, but had actually occurred, *without the existence of any law to punish them*" (*Id.*, p. 154).

He opposed the amendment, however, and it was at first lost (*Id.*, p. 157).

On a subsequent day the discussion was resumed. Mr. Barbour, who subsequently became a member of this Court, stated that

> "he highly approved of much that the bill contained, and thought that many of the offences it contemplated were worthy of punishment; but the object he wished to obtain in the modification he now suggested, was, that the federal courts should have cognizance of all cases where punishment was necessary, *and where the State courts have no jurisdiction; but that where the State courts have jurisdiction, there none should be given to the United States. . . . His wish was to avoid all colliding jurisdictions*" (*Id.*, pp. 165–6).

Webster then argued at length against the change, urging, in substance, that crimes committed in any part of the admiralty and maritime jurisdiction of the United States had close relation to commerce; that the United States had power to punish them; and that the matter ought not to be left solely to the States, which, on account of the expense, might not punish such crimes, even though they had jurisdiction to do so (*Id.*, pp. 166–7). Mr. Barbour again argued in favor of the amendment, and the matter went over (*Id.*, p. 168).

On a later day, Mr. Wickliffe moved to recommit the bill to the Judiciary Committee with instructions to amend it, among other things, "by altering the other sections in such a manner as to confine the operation of the bill to places without the jurisdiction of any particular State" (*Id.*, p. 335). He again argued at length in support of the amendment (*Id.*, pp. 335–6). In reply Webster expressed his intention, "in reluctant acquiescence with the wishes of a highly respected member of the Judiciary Committee," "to modify the bill in the manner the gentleman desired" (*Id.*, p. 338); and the statute, as it passed, provides for the punishment of the specified crimes only when committed "within the admiralty and maritime jurisdiction of the United States, *and out of the jurisdiction of any particular state*" (4 Stats. at Large, p. 115; Act of March 3, 1825, Sec. 4).

It is thus apparent that the principle that there should not be created a concurrent jurisdiction in the State and Federal Governments to punish crime was vigorously asserted in the debates on the bill, and found expression in it against, in one particular, the powerful opposition of Webster.

Although Webster, for special reasons, opposed the amendment to Section 4, he was, as already seen, fully in accord with the general desire "to avoid a *conflict of territorial jurisdictions* between the United States and the several States." This he declared to be "one of the principal objects in framing this bill";

and this purpose plainly led to the use of the language employed in Section 3, upon which the Act of 1898 was modeled. The "offense committed" obviously contemplated a crime perpetrated entirely outside the jurisdiction of the State, and in no way punishable by it. Webster thus explained the purpose of the section:

> "As to the third section, it must be obvious that, where the jurisdiction of a small place, containing only a few hundreds of people (a navy yard, for instance), was ceded to the United States, some provision was required for the punishment of offenses; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the State in which the yard, &c., might be. He was persuaded that the people would not view it as any hardship that the great class of minor offenses should continue to be punished *in the same manner* as they had been before the cession" (*Id.*, 338).

Speaking of the act as a whole, Edward Everett, who was himself in Congress from 1825 to 1835, and succeeded Webster as Secretary of State, says:

> "As it finally passed, in twenty-six sections, *it covered all the cases which had occurred in the thirty-five years which had elapsed since the law of 1790 was enacted;* and it amounted to a brief, but comprehensive code of the criminal jurisprudence of the United States, as distinct from that of the separate states. It was Mr. Webster's object in this statute, not to enact theoretical reforms, but to remedy practical evils; to make provision *for crimes, which, for want of jurisdiction, had hitherto gone unpunished.* It was the effect of Mr. Webster's act, *not to create new offenses*, but to bring within the reach of a proper tribunal crimes recognized as such by all the codes of

law, *but which had hitherto escaped with impunity between separate jurisdictions.*"
Biographical Memoir; Webster's Works.
Boston, 1853, Vol. I, p. *lxxxix.*

Considering the Act of 1825, then, in the light of "contemporaneous events," of "the situation as it existed, and as it was pressed upon the attention of the legislative body" (Holy Trinity Church *v.* United States, *supra*), it is clear, not only that the evil sought to be remedied was *the existing inability to punish crimes committed wholly in Federal territory, and of which the States could not take cognizance*, but that Congress was equally desirous of *avoiding any conflict with the jurisdiction of the States* over offenses punishable by their own laws. Where the State could take cognizance of an offence, in any of its aspects, no jurisdiction was to be exercised by the Federal tribunals.

If the Government's contention be sound, the publisher of an alleged libel originally uttered in State territory, but incidentally spreading into one of these ceded places, might, after a trial and acquittal or conviction in a State court, be subsequently prosecuted for the same libel in a Federal tribunal because of the technical republication of the libel on the national soil. Would the acquittal or conviction in the State court be a bar to the Federal prosecution? Our adversaries say "no," because an act of publication, operating in two distinct jurisdictions, constitutes two crimes, one of which will go wholly unpunished unless by means of a Federal prosecution.

To illustrate: The District Court for the District of Indiana has held it to be more than doubtful whether articles of the same substantial import as those set forth in this indictment are even libelous (United States *v.* Smith, 173 Fed. Rep., 227–8), whereas our adversaries characterize them as libelous beyond dispute. A State court might

follow the view of Judge Anderson, and a Federal court adopt that of the Department of Justice, or *vice versa*.

But this is not all. If the statute authorizes the Federal courts to take cognizance of newspaper libels originating outside of Federal territory, and only penetrating therein in the course of their general circulation, the National government may with as good reason take upon itself the prosecution of many other crimes against the laws of the states, whenever any part of the transaction has taken place in Federal territory. Thus of a conspiracy to violate the State laws, if some act toward its consummation were committed at West Point; or of a nuisance, actually maintained outside of a Federal reservation, but obnoxious to its residents. So of all crimes not wholly, but only partially, committed in the National territory.

These considerations merely suggest the difficulties of the theory of *concurrent* jurisdiction. They become vastly important when we remember the scrupulous concern of the framers of the assimilative statute to avoid the "collisions" which must result from concurrent jurisdiction over offenses of this character, and hence their purpose of avoiding that very serious evil.

Let us suppose that in the Congress of 1825 some member had offered a bill giving the Federal Government the right, in terms, to take cognizance of newpaper libels incidentally circulating in Federal territory, or of any other crime punishable under state laws, provided only that some portion of the crime, however trivial, took place on Federal soil. Can it be believed that such a measure would not have been received with an outburst of indignant protest from every member of the House? Yet it is seriously contended that the Act of 1825 accomplished precisely this result.

4. The whole history and life of the country condemn the construction asserted by the Government.

If the interpretation of the Act contended for by the Government be adopted, its necessary result will be to confer upon the national authority a general control over the press of the country. There are in the United States over two thousand federal places, scattered all over the Union. They are to be found in large numbers in every State, and necessarily in every judicial district. It is a matter of common knowledge that in almost all of them the newspapers which are printed in all of the states circulate to a greater or less extent. In order to bring these acts within the jurisdiction of the federal courts all that the Department of Justice need do is to find some copies of the offending journal circulating in one or more of these places, and then proceed with a prosecution of the publisher on the theory that the courts of the United States have jurisdiction because of the incidental publication of the libel in its territory. The prosecution might, it is true, take the form of an indictment for libel of an individual; but the theory, once established, would put it in the power of the Federal Government to use the courts of the United States to prosecute any publisher who had attacked the government, or the character of government officials, by criticizing their public acts. In a word, it would give the Federal Government complete control of the press of the United States.

If this theory can be maintained we shall revive in our day and generation the Sedition Act of 1798, which for over a century has been condemned not only as unconstitutional, but as contrary to the genius of our free institutions; for if there is one thing in this country which is settled by the verdict of history it is that the power to control the press shall not be entrusted to the national government, but shall be left to the tribunals of the several states.

Is it possible to suppose that the Congress of 1825 intended to pass an act which would enable federal courts to exercise the forbidden power?

The answer is to be found in the history and fate of the one memorable attempt of the Federal government to assume that very jurisdiction, an attempt which, in 1825, was still fresh in the memory of public men. In 1798, and for several years previous, the country was in a very critical state. England and France were at war. France was making every effort to embroil us in the struggle, and its pretensions were ardently supported by the Republican party of the day. The country swarmed with French political agents and sympathizers, and attacks upon the Government for remaining neutral were many and bitter. The temptation to punish these attacks was peculiarly strong;* and the Federalists yielded to it. On July 14th, 1798, was passed the notorious Sedition Act (1 Stat., 596), Section 2 of which made it punishable, under heavy fine and imprisonment, to print or publish any false, scandalous and malicious writings against the government of the United States, or either House of the Congress, or the President, with intent to defame them, or to bring them into contempt or disrepute, or to excite against them the hatred of the good people of the United States, or *to stir up sedition*, or with intent to excite any unlawful combination for opposing or resisting any law of the United States, or any lawful act of the President, or to excite generally to oppose or resist any hostile designs of any foreign nation against the United States.

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* "For passing the act there was unquestionably great provocation. No man who has not waded through the political literature of the closing years of the last (eighteenth) century, can form any conception of the depths of falsehood, of knavery, of calumny, of shameful abuse to which it is possible for writers of pamphlets and editors of newspapers to descend." (McMaster's History of the People of the United States, Vol. II., p. 397.)

Although this measure was directed against the French and French sympathizers, and although the conduct of the French nation at this time was so insolent and offensive that in the previous year President Adams, in a special message to Congress, had recommended preparations for war, yet the Act was so unpopular that it was by far the most potent of the factors which led to the speedy downfall of the Federalists and the election of Jefferson.*

The prosecutions under the Act were very unpopular. The impeachment proceedings against Justice Chase were based in part upon his conduct in one of them. Jefferson and Madison at once took the position that the Act was unconstitutional, and embodied these views in the famous Kentucky and Virginia Resolutions.†

* That this Act did more than anything else to turn the Federalists out of power, is the unanimous verdict of history. It "sealed the fate of the Federal party." (Von Holst, Constitutional and Political History of the United States, Vol. I, p. 142.) "They (the Democrats) had seen no vision of national duty, no workable creed, until the Alien and Sedition laws were passed and the Sedition law enforced against editor and pamphleteer. Then they had had sight at last of the constitutional principles and the domestic policy for which they must fight. Mr Jefferson and Mr. Madison had cleared their thought with the strong sentences of the Kentucky and Virginia Resolutions,—no programme, but a warning cry which no man failed to hear or to understand; and the election of 1800 disclosed, behind Mr. Jefferson, no longer a body of agitators merely, but a national party, ready to play the sober role of administering a government." (Wilson, History of the American People, Vol. III, pp. 167–8.) "Had the Federalist Congressmen assembled in caucus and debated by what means they could make themselves more hated than they had ever been before, by what means they could destroy their present power, by what means they could turn thousands of 'black cockaders' into bitter and inveterate foes, they could not, by any possibility, have found a means so efficient as the law against libelous and seditious writing." (McMaster, History of the People of the United States, Vol. II, p. 397.)

† Curtis, Constitutional History of the United States, Vol. II, p. 3.

The criticism of the act, and the widespread conviction that it was unconstitutional, were not based on any particular stringency in its provisions, but upon the belief that Congress had no power to legislate upon the subject of libel, that being a matter peculiarly within the cognizance of the states. The Kentucky resolutions asserted that, "Libels, falsehoods and defamation, equally with heresy and false religion, are withheld from the cognizance of Federal tribunals." *

Jefferson, in a letter to Madison on June 7, 1798, said that the Alien Bill and the Sedition Bill

> "both are so palpably in the teeth of the Constitution as to shew they (the Federalists) mean to pay no respect to it."
>
> Jefferson's Writings, Putnam Ed., Vol. VII, p. 267.

In a letter to Stevens Thomson Mason, then a member of the Senate, on October 11, 1798, he said:

> "For my own part, I consider those laws as merely an experiment on the American mind, to see how far it will bear an avowed violation of the Constitution" (*Id.*, p. 283).

The Act was even opposed by Marshall and Hamilton, probably the two ablest constitutional lawyers in the ranks of the Federalist party.†

On Jefferson's accession to the Presidency, he at once pardoned and released every person convicted of a violation of the Act.‡

In a letter to Mrs. Adams on July 22, 1804, in answer to a complaint from her for releasing Callender, convicted of libeling her husband, Jefferson says:

> "I do not know who was the particular wretch alluded to, but I discharged every

* Jefferson's Writings, Putnam Ed., Vol. VII, p. 295.

† Von Holst's Constitutional History of the United States, Vol. I, pp. 142-8; The Federalist System, Basset (Hart's American Nation Series), 1789-1801, p. 260.

‡ Wilson, History of the American People, Vol. III, p. 174.

person under punishment or prosecution under the sedition law because I considered, & now consider, that law to be a nullity."

Jefferson's Writings, Putnam Ed., Vol. VIII, p. 309, n.

On September 11, 1804, he again wrote to Mrs. Adams:

"*While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so.* They have accordingly, all of them, made provisions for punishing slander, which those who have time and inclination, resort to for the vindication of their characters. In general, the State laws appear to have made the presses responsible for slander as far as is consistent with its useful freedom. In those States where they do not admit even the truth of allegations to protect the printer, they have gone too far."

Id, p. 311.

In 1830 occurred the trial of Judge Peck before the Senate of the United States. Two of the managers on the part of the House of Representatives were James Buchanan and Mr. McDuffie of South Carolina. Both of them were members of the House in 1825, and Buchanan, as we have seen, was one of the members fo the Judiciary Committee which reported the Crimes Act of that year.

In his argument on the trial of Judge Peck in 1830, Buchanan, although he had been a warm supporter of the Act of 1825, after referring to the constitutional prohibition against the making of any law abridging the liberty of speech or of the press, said:

"What was the intention of this provision? The framers of the constitution well knew that *under the laws of each of the states composing this union libels were punishable.* They therefore left the character of the

> officers created under the constitution and laws of the United States to be protected by *the laws of the several states.* They were afraid to give this government any authority over the subject of libels; *lest its colossal power might be wielded against the liberty of the press.* They have guarded it with a wholesome and commendable jealousy. . . . The popular odium which attended this law was not excited by its particular provisions, *but by the fact that any law upon the subject was a violation of the constitution.* Congress had no power to pass any law of the kind, good or bad. It is now, I believe, freely admitted by every person (I at least have not for several years conversed with any man who held a contrary opinion) that Congress, in passing this Act, had transcended their powers. I have no doubt that the motives of many of those who passed it were perfectly pure; but yet if any principle has been established beyond a doubt by the almost unanimous opinion of the people of the United States it is that the sedition law was unconstitutional. Such is the strong and universal feeling upon this subject that if any attempt were now made to revive it the authors would probably meet a similar fate with those deluded and desperate men in another country who have themselves fallen victims upon the same altar on which they had determined to sacrifice the liberty of the press "* (Trial of Judge Peck, Stansbury's Ed., p. 447).

In the same case Mr. McDuffie said:

> "In pronouncing sentence of condemnation upon this Sedition Law, the people of the United States have solemly decided that the Federal legislature has no power to protect

*The reference is to the prosecutions instituted by Sir James Scarlett, Attorney-General, against the proprietors and printers of the *Morning Journal* for libels on the King, the House of Commons and the Duke of Wellington, proceedings which "were received with universal dislike by all parties in the country" (Shortt on Informations, p. 9, n. v.).

> the public functionaries from *even the most abusive and licentious exercise of the freedom of the press, holding that the State legislatures and State tribunals are more safe depositories of that power;* and such is the plain language of the constitution."*

In 1833, Buchanan, t[illegible] Minister to Russia, told Count Nesselrode that:

> "The press was essentially free in our country. Even the Congress of the United States had no power to pass any law for the punishment of a libel on the President. This subject was *entirely within the jurisdiction of the several States.*"†

In 1836, in consequence of a recommendation contained in a message from President Jackson, a select committee of the Senate returned a bill prohibiting the transmission through the mails of inflammatory publications tending to incite popular discontent, and giving the President power to decide as to the character of the publications sought to be transmitted. In a speech in opposition to the measure, Calhoun asserted that

> "It would place in the hands of the general government an instrument *more potent to control the freedom of the press than the Sedition Law itself.*"

The bill was defeated.

Works of Calhoun, Vol. II, p. 514.

On July 4, 1840, President Van Buren approved an act directing the Secretary of the Treasury to pay to the legal representatives of Matthew Lyon, the fine which had been imposed on Lyon in 1799 under the Sedition Act, with interest in full.

6 Stat., 802.

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* Trial of Judge Peck, Stansbury's Ed., p. 90.

† Buchanan's Works, Moore, Vol. II, p. 325.

In reporting the bill to the House, the Committee on the Judiciary adopted a report of the same committee made in 1830, which reads as follows:

> "The committee are of opinion that the law above recited was unconstitutional, null and void, passed under a mistaken exercise of undelegated power, and that the mistake ought to be corrected by returning the fine so obtained, with interest thereon, to the legal representatives of Matthew Lyon. The committee do not deem it necessary to discuss at length the character of that law, or to assign all the reasons, however demonstrative, that have induced the conviction of its unconstitutionality. No question connected with the liberty of the press ever excited a more universal and intense interest—ever received so acute, able, long continued and elaborate investigation—was ever more generally understood, or so *conclusively settled by the concurring opinions of all parties*. All that now remains to be done by the representatives of the people who condemned this act of their agents as unauthorized, and transcending their grant of power, to place beyond question, doubt or cavil that mandate of the constitution prohibiting Congress from abridging the liberty of the press, and to discharge an honest, just, moral and honorable obligation, is to refund from the Treasury the fine thus illegally and wrongfully obtained from one of their citizens, for which purpose the committee herewith report a Bill."
>
> Cong. Globe, 1st Sess., 26th Cong., p. 411; House Doc. No. 86.

The bill passed the House by a vote of 124 to 15. *Id.*, p. 414.

> "Thus," says Wharton, "just forty years after the passage of the Sedition Law was its last vestige effaced, and its doctrines formally disowned."
>
> U. S. State Trials, p. 344, *note*.

In 1844, and again in 1850, Congress passed similar acts, respectively approved by Presidents Tyler and Fillmore, directing the repayment of the fines which had been imposed on Anthony Haswell, in 1800, and on Thomas Cooper, in 1798, under the Sedition Act.

9 Stat., 151; *Id.*, 799.

In 1881, David Dudley Field, speaking of the Sedition Act, said:

> "If this were within the competency of Congress, the punishment of libel upon any officer of the United States would be equally within its competency. Indeed it is not easy to perceive why Congress might not take upon itself all remedies, criminal and civil, for any wrong done to the good name, person or property of any federal officer, and send the parties before the federal courts for trial. Can there be a doubt that such an assumption of power was never dreamed of by those who framed or those who ratified the federal constitution?"
>
> *North American Review*, May, 1881.

In *Ex parte* McLeod, 120 Fed. Rep., 130, 136, decided in 1903, the court said:

> "Profound distrust of the ability of the people to govern themselves, alone, made it possible to enact the alien and sedition laws, which expired by their own limitations, and were ever afterwards condemned by the aggressive power of a dominant public opinion, which proclaimed as a maxim of government that greater danger to liberty and free institutions lurked in any power to curb the right of free speech and liberty of the press, than from any abuses which might result from leaving them untrammeled. *This public opinion, which has been acquiesced in by all departments of the government and gone unchallenged for a century past, has pronounced a construction of the constitution in this respect which has silently incorporated itself into that instrument.*"

In view of this chapter of our history the special Message to Congress of the President of the United States of December 15th, 1908, makes curious reading. Speaking of the newspaper stories, then recently in circulation, with respect of the transactions alluded to in this indictment, he said:

> "I do not believe we should concern ourselves with the particular individuals who wrote the lying and libellous editorials, articles from correspondents, or articles in the news columns. The real offender is Mr. Joseph Pulitzer, editor and proprietor of *The World*. While the criminal offense of which Mr. Pulitzer has been guilty is in form a libel upon individuals, the great injury done is in blackening the good name of the American people. It should not be left to a private citizen to sue Mr. Pulitzer for libel. He should be prosecuted for libel by the Governmental authorities. In point of encouragement of iniquity, in point of infamy, of wrongdoing, there is nothing to choose between a public servant who betrays his trust, a public servant who is guilty of blackmail, or theft, or financial dishonesty of any kind, and a man guilty as Mr. Joseph Pulitzer has been guilty in this instance. It is therefore a high national duty to bring to justice this vilifier of the American people, this man who wantonly and wickedly and without one shadow of justification seeks to blacken the character of reputable private citizens and to convict the government of his own country in the eyes of the civilized world of wrongdoing of the basest and foulest kind, when he has not one shadow of justification of any sort or description for the charge he has made. The Attorney-General has under consideration *the form* in which the proceedings against Mr. Pulitzer shall be brought."

Here we have reincarnated the very spirit of the Sedition Law—the theory that strictures upon the conduct of public officials are not to be treated as

mere libels upon individuals, but constitute a sort of treason, against which all the "colossal power" of the Federal government should be wielded.

In the performance of their "high national duty" the Government authorities sought "to bring to justice this vilifier of the American people" who had sought "to convict the government of his own country in the eyes of the civilized world of wrong-doing of the basest and foulest kind" through the instrumentality of this indictment, charging, not a libel on the Government, but merely the defamation of certain individuals. But this is merely the *form* of the prosecution. It is in substance and in fact an indictment for the publication of what in 1798 would have been alleged, in terms, to constitute a seditious libel, tending to stir up discontent and disaffection, and to bring the Government into contempt. Indeed, this is expressly charged, namely, that it was the defendant's purpose "*to stir up disorder among the people.*" The language of the Sedition Act was "to stir up sedition."

SECOND.—The offense charged in the indictment is not even within the letter of the statute.

So far the endeavor has been to ascertain the legislative intent, upon the assumption—as the Government contends—that the language of the act, literally construed, is broad enough to embrace the case at bar. It remains to consider whether the present case is even within its letter.

The Act of July 7, 1898, punishes—as, in fact, it could punish—only an "offense committed" in Federal territory. What is such an "offense," so "committed?"

(*a*) The criminal law of the State in which the Federal territory is situated is made the basis of criminality under the Act of Congress,—the test whether or not a given act is of a character sought to be punished by the latter. This is obvious from the language employed. An "offense committed" in Federal territory can receive only "the same punishment" as "the like offense" when committed within the jurisdiction of the State. No greater power to punish is given by the Act of Congress than under the laws of the State; and since crime and punishment go hand in hand,—since what is not punishable is not a crime,—it necessarily follows that the State law is the test of criminality. What is not criminal when done within the jurisdiction of the State is not criminal when done within the jurisdiction of the Federal Government.

(*b*) It is equally clear that the act or acts done within Federal jurisdiction must be such that they would, *in and of themselves*, if done within the jurisdiction of the State, constitute a crime against the laws of the State. There must be an "offense committed" within the Federal territory. This imports, of course, a *completely consummated* breach of the criminal law. If it were not that, to punish it would be to punish what was not a crime. And, since Congress has the power, and in this act attempts, to punish only acts done within the jurisdiction of the Federal Government,—an "offense committed" therein,—the acts done *within that jurisdiction* must be a complete crime.

(*c*) From these two principles it is plain that, where a certain act, amounting to the "offense" specified, is done in Federal territory, and a separate and distinct act, of like character, within the jurisdiction of the State, two distinct crimes have been committed,—one against the Federal law, the other against the State law. And it inevitably fol-

lows that, if, in such a case, the Federal territory had been land within the jurisdiction of the State, there would have been two distinct crimes against the State, conviction for one of which would not have been a bar to prosecution for the other.

In the case at bar we have, according to the theory of the present indictment, precisely such a situation, namely, the publication of the alleged libel both within and without a place ceded to the Federal Government,—the publication in such place being an act punishable by the Federal Government, but the publication elsewhere being an act of which it had no jurisdiction whatsoever. The crucial question thus is: *Assuming that the entire territory through which the articles were circulated had been within the jurisdiction of the State of New York, would several crimes have been committed against the State, the publication in each of the places ceded to the Government constituting, in and of itself, a distinct crime?* We have already considered the extraordinary nature of such a contention. It is based upon the theory *that the act of publication will be subdivided* in order to make many crimes out of a single libel. As we have already pointed out this theory of the Government would certainly make, out of a single publication of a newspaper article, as many distinct crimes as there are places within the jurisdiction of the Federal Government in which the article circulates; and, carried to its logical conclusion, would appear to make a distinct crime out of each sale of the paper.

We are not now concerned with the question whether this startling result *might* be made to follow from the facts of the case under consideration—whether this appalling burden of crime *might* be constitutionally evolved out of the publication of a newspaper article. The question is whether the criminal statute under construction takes such a hard, such a wellnigh intolerable, view of the case;

and the test in the case at bar is to be found in a consideration of the nature of

THE NEW YORK LAW OF CRIMINAL LIBEL.

The Government might have considerable difficulty in establishing that the common law, as administered in either England or this country, ever made many crimes out of the publication of a single newspaper article, in the ordinary course of business, upon the theory that any particular sale or series of sales constituted a distinct offense. The solution of the case at bar, however, does not require any sifting of the common law, for when the Act of Congress of July 7, 1898, took effect, the criminal law of New York, both substantive and procedural, had been codified for seventeen years (New York Penal Code, Laws of 1881, Chap. 676; New York Code of Criminal Procedure, Laws of 1881, Chap. 442). These statutes embody the law in force in New York on July 7, 1898, which was incorporated into the Act of Congress taking effect on that date by the provision that acts done in Federal territory shall receive the same punishment as the State laws "*now* provide for the like offense."*

Franklin *v.* United States, 216 U. S., 559, 568–9.

Section 243 of the Penal Code provides:

> "A person who *publishes* a libel is guilty of a misdemeanor."

It is the *publication* of the libel which is here made a crime, not the publication in this or that place, or to this or that person. *The act is treated*

* The provisions hereafter referred to from the Penal Code, in force in 1898, are carried into the later Penal Law of New York without substantial change. (Consolidated Laws, Chap. 40, Secs. 1341, 1343, 1346, 1347, 1348.) The Code of Criminal Procedure has not been recodified.

as one and indivisible. If there could be any doubt on this head, it is completely resolved by other provisions. Sec. 245 of the same Code provides:

> "To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself."

As it is the *publication* of the libel which is made criminal, the crime is necessarily complete when once the libel is displayed, or its custody parted with, under the circumstances specified.

Sections 249 and 250 provide that, where a person libeled is a resident of the State, the prosecution shall be either in the county of such residence, or the county where the paper is published; and that, where the person libeled is a non-resident, the prosecution shall be in the county in which the paper, on its face, purports to be published, or, if it does not so indicate, in any county in which it was circulated. Finally, Section 251 provides:

> "*A person cannot be indicted or tried for the publication of the same libel, against the same person, in more than one county.*"*

Section 138 of the Code of Criminal Procedure contains similar provisions as to the place for the prosecution of a libel, and the immunity from liability to prosecution in more than one county. It also contains the following provisions:

> "When an act charged as a crime is within the jurisdiction of another State, territory or country, as well as within the jurisdiction of this State, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this State" (Sec. 139).

* The provisions of Sections 249, 250 and 251 were taken from a much earlier statute (Laws of 1852, Ch. 165).

> "When a crime is within the jurisdiction of two or more counties of this State, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another" (Sec. 140).

These provisions define, with unmistakable clearness and precision, the policy of the State of New York in respect of a libel composed, printed and published within the jurisdiction of the State. What is made criminal is the *publication* of a libel; and the publication of a single libel can be punished but once. Since the commission of this act of publication is not confined to one spot, the crime is, in its nature, capable of punishment in more than one place; and this principle finds recognition in the various provisions determining the county in which the prosecution shall be had. It is, none the less, a *single* crime, punishable but once; and where it has been once punished, whether in the State of New York, or in some other State, territory or country, it cannot be again punished in the former. Here is the completest refutation of the theory of the divisibility of the publication and the multifariousness of the crime, upon which the whole prosecution rests. Granting that Congress *might* constitutionally provide a separate punishment for the distinct act of circulating libelous matter in Federal territory, it has not done so. *It adopts the New York law;* and that law provides, in the case of each article, one punishment for the entire series of acts connoted by the term "publication," and makes that punishment exclusive of any other. It also fixes a place where the punishment shall be inflicted, namely, the county in which the libel is published, or the county where the libeled person resides; or, under special circumstances, any other county in which the paper was circulated. It will not be denied that the reference is to that part of the territorial limits of a county which is within the jurisdiction of the State; that the punishment referred to is one to be inflicted by

the proper State officials. It is thus clear that what is punished under the State law is the *entire* publication; and that it is punished at a place and in a manner necessarily exclusive of the Federal authorities.

That the acts here in question are not criminal becomes plain upon consideration of a concrete case. On October 3, 1908, for instance, the defendant published about three hundred and eighty thousand copies of an alleged libel in the State of New York and elsewhere. Of this entire issue of the paper thirty copies found their way into Federal territory within the Southern District of New York. Conceding the power of Congress to punish the publication of these thirty copies, we find that it regards the act as criminal only in so far as the State of New York regards it as criminal. *The effect of the adoption by Congress of the State law is that, for the purposes of this case, the State statutes are in force throughout the entire territorial limits of the State.* But if, in fact, the State law of criminal libel had been in force throughout the whole of New York and Orange Counties, it is perfectly evident that it would not have made either one crime, or two, out of the publication of these thirty copies. It would not have punished the particular acts in question at all, except as they constituted a part or incident of the entire publication of the paper on the day in question. In punishing the whole it may be said to punish the parts; but it attempts to punish the parts only by and through punishment of the whole. Concededly, however, the Federal Government has no power to punish the whole offense, and is not attempting to do so. In proceeding to punish the parts as com plete and as independent crimes, it is attempting to construct a crime out of what is, under the State law, insufficient for that purpose. If the Act of Congress permits this, then it necessarily makes criminal what the State law does not make criminal, in spite of the expressed intention to the contrary.

If the acts in the case at bar constitute a crime under the Federal statute, a strange result follows. As has been seen, the law of New York treats the publication of a libel as an indivisible act, constituting a single crime; and a conviction or acquittal of this crime "within the jurisdiction of another State, territory or country" is a bar to a prosecution therefor in New York (N. Y. Code Criminal Proc., Sec. 139). This language does not embrace a prosecution in a place ceded to the Federal Government and under its exclusive jurisdiction. So that although a conviction or acquittal in any other State or territory of this country, or in any foreign country, would prevent a prosecution in New York, a prosecution, or any number of prosecutions, in places within the jurisdiction of the Federal Government would still leave the accused open to another indictment in New York. In the former case the New York theory of the indivisibility of the crime is vindicated. In the latter case it is set aside. Plainly this was not intended; and evidently it never occurred to the Legislature of New York that the construction here contended for could possibly be placed upon the Act of Congress.

This would all be true even if the publication of the thirty copies charged in the indictment were of itself an act beyond the jurisdiction of the State courts, since the Act of Congress does no more than adopt the State law, and the latter provides but a single punishment for the entire publication, wherever taking place. *In fact, however, the State was competent to punish the publication of these thirty copies.* These copies "the defendant delivered and caused to be delivered" within the Federal territory (pp. 86-7). The papers were put in circulation and circulated therefrom (from the defendant's printing office) throughout the United States" (p. 87). It is clear that the defendant delivered these copies of the paper, in the jurisdiction of the State of New York, to an agent or messenger, with intent that they be delivered to the purchaser, either through

the mails or otherwise. This, beyond question, was a publication of the alleged libel within the jurisdiction of the State of New York.

> "To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, *or parted with its immediate custody*, under circumstances which exposed it to be seen or understood by another person than himself" (N. Y. Penal Code, Sec. 245; N. Y. Penal Law, Sec. 1343).

And such is the common law:

> Rex *v.* Barnett, 4 Barn. & Ald., 95, 126;
> Youmans *v.* Smith, 153 N. Y., 214, 218-19;
> Commonwealth *v.* Dorrance, 14 Phila. Rep., 671, 672;
> Callan *v.* Gaylord, 3 Watts, 321, 324.

It is thus apparent that the Act of Congress, as construed by the Government, creates, at the very least, a concurrent jurisdiction, in the Federal courts to punish a specific act or series of acts which are fully within the jurisdiction of the State; and such an intention, as we have shown, was never entertained by the law-making body. In fact, it does more. By isolating this trivial portion of the act of publication, and creating out of it an independent crime, Congress would run counter to the policy of the State and to its theory of the law of libel. It would give to the "offense committed" in Federal territory an accumulation of punishments, instead of the one accorded to it by the law of the State, in spite of the expressed purpose to the contrary. In substance it would create a new offense,—one not known to the State law.

We thus earnestly contend that, when the Act of Congress which is relied upon is analyzed, it appears

that the acts which form the basis of this prosecution are not embraced within its provisions. The main proposition advanced for the Government is simply that the gist of the crime of libel is the *publication*, and that it is perfectly competent for any independent jurisdiction to punish the circulation of a libel within its borders, although it originates elsewhere. We have no disposition to dispute this proposition, which is certainly supported by authority.

Commonwealth *v.* Blanding, 3 Pick., 304;

Haskell *v.* Bailey, 63 Fed. Rep., 873, 875.

It does not, however, in any way meet the foregoing argument. Even if Congress had the power to punish, as an independent crime, the publication of libelous matter in Federal territory, under the circumstances disclosed in the case at bar, it did not in fact attempt to do any such thing. On the contrary, it adopted, as to such acts, the legal policy of the State of New York; and that policy prohibits their punishment by the Federal Government at all. This is the necessary inference to be drawn from the language of the Act.

CONCLUSION.

The judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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